Under such circumstances, the logical and equitable rule is the same as that which applies when one has performed services at the request of an agent who acts without any authority, apparent or real, from his alleged principal. It is the agent who is responsible for the services, not the principal. It is generally held, therefore, that where a receiver is appointed at the request of certain parties and the appointment is without legal authority and void, *that the expenses of the receivership are chargeable to those parties at whose instance the receiver was appointed and not to the receivership fund. Couper* v. *Shirley* (C. C. A.), 75 F. 168; *Grant* v. *Los Angeles & P. R. Co.*, 116 Cal. 71, 47 P. 872; *Bowman* v. *Hazen*, 69 Kan. 682, 77 P. 589; *State ex inf. Hadley* v. *People's etc., Bank*, 197 Mo. 605, 95 S. W. 867." (Italics ours.)

This rule was followed in *Bowersock Mills & Power Co.* v. *Joyce*, 101 F. (2) 1000. At page 1002, the court said:

"The general rules are that where a receiver is *regularly and lawfully appointed*, his expenses and compensation *are to be charged only against the receivership funds and not against the party who procured his appointment*, but that where the appointment of the receiver was irregular or inequitable or *the court which appointed him was without authority so to do, the party who procured the appointment, and not the receivership fund*, is liable for the expenses of the receivership." (Italics ours.)

This rule is also applicable in bankruptcy (*In Re. Philadelphia & Lewis Trans. Co.*, 127 F. 896).

The funds collected by the trustee whose appointment had been reversed belonged to the stockholders of the dissolved corporation (*R. F. C.* v. *Teter*, 117 F. (2) 716). Since they were not before the court and since the court had no jurisdiction over the fund illegally collected (and in the absence of the parties who might be entitled thereto could adjudicate no rights), the District Court properly ordered

the money turned over to the Indenture trustee, without making any finding as to the rights the parties who might ultimately be entitled thereto (R. p. 70). That determination is the province of a court having jurisdiction of the parties and the subject matter.

But the court committed grave error in deducting from this fund the fees of the trustee and his counsel, the cost of the brief of unsuccessful petitioning creditors and depleting the fund in excess of $4,300.00. The reasonableness of the trustee's fees and of his counsel and the small amount of the brief charges, are immaterial. The important point is that these charges were deducted from *funds belonging to persons not before the court and who had no opportunity to contest the payment of these amounts.* After reversal, these parties were entitled to the return of their property and the money collected therefrom, free of the charges of a trustee and his counsel illegally imposed upon them. Both the decision of the District Court and that Court of Appeals in depriving them of their rights when they were not before the court clearly violates the "due process" clause of the Fifth Amendment to the United States Constitution.

(c) The Mandate of the Court required no interpretation and was binding on the District Court as well as on the Court of Appeals and the latter was without jurisdiction to change its mandate on this appeal.

The mandate was to dismiss the proceedings for want of jurisdiction. This was not only binding on the District Court to whom it was directed, but also on the Court of Appeals, which issued the mandate (*Casey* v. *Sterling Ceder Co.*, 15 F. (2) 52; *Hart* v. *Wiltsee*, 25 F. (2) 863; *Foster Brothers Manufacturing Co.* v. *N. L. R. B.*, 90 F. (2nd) 948; *Raymond* v. *Wickersham*, 129 F. (2) 522). The

trial call may take no action not consistent with the mandate (*Fleniken* v. *Great American Indemnity Co.*, 142 F. (2) 938, 939).

The opinion relies on the right to modify a mandate under the decision in *Luminous Unit Company* v. *Freeman-Sweet Co.*, 3 F. (2) 577. In that case the Court *distinguished* the *Lackner* case (2 F. (2) 516) on the ground that in the Lackner case no decision of the Supreme Court changing the law had intervened between the first appeal and the second appeal, while in the *Luminous* case, such a decision intervened wherein the Supreme Court of the United States "announced a decision at variance with the opinion" on the former appeal. No such decision was announced here at variance with the opinion rendered on the first appeal.

It is curious to note that the Judge who wrote this decision and relied on his previous opinion in the *Luminous* case as authority for the District Court to violate the mandate in the Court of Appeals, cited the *Luminous* case for the *opposite* proposition. Judge Evans wrote the opinion in *Chain O'Mines* v. *United Gilpin Corporation*, 131 F. (2) 824. After the Seventh Circuit had reversed a decree against the defendant in favor of the plaintiff with directions to dismiss the complaint for want of equity, the District Court "ignored the mandate" and retained jurisdiction to allow damages to the defendant. The retention of the jurisdiction in that case was under the doctrine of restitution. However, the Court of Appeals was jealous of its mandate and in reversing the order said (p. 825):

> "The retained jurisdiction of the Court for the purpose of permitting a trial and an award of damages violated the mandate of the Court of Appeals which definitely controlled the action of the District Court."

In support of the foregoing, *he cited Luminous Unit Co.* v. *Freeman-Sweet Co., supra.*

In an effort to overcome the force and effect of its decision upon the first appeal, the Court of Appeal says:

> "Even though the mandate issued in the former appeal were to be construed to deny any jurisdiction to the District Court, this court would now correct its ruling in view of the facts concerning the moneys in the hands of the trustee, etc., for the first time now disclosed to us. They were not presented or considered on the previous appeal."

The Court of Appeals did not point out to any change in the law, nor has it pointed out to any change in the facts. The only reference it may have is to the amount of money which the trustee was possessed. It knew, however, that the trustee was managing the property and was collecting the income and that such question would come up upon the reversal of its appointment, for it appears from the opinion of the court on the previous appeal, that it knew of the existence of such facts. Under no stretch of the imagination does the decision in *Luminous* case on which it relies, apply to the instant case.

In citing it for the opposite view in *Chain O'Mines* v. *United Gilpin Corporation*, 131 (2nd), 824, *supra*, Judge Evans also said:

> "The District Court under the plain mandate of the Appellate Court was under the compulsion to dismiss the suit. If the defendants desired different and additional relief they should have sought and secured a modification of the mandate of the Appellate Court."

This was not done in the instant case.

(d) The order taxing the costs and fees against the petitioning creditors was proper.

The District Court properly taxed the costs and expenses against the petitioning creditors and this order should have been affirmed. When petitioning creditors

invoked jurisdiction of a bankruptcy court and their petition has been dismissed for want of jurisdiction, the bankruptcy court had the power to tax the costs against the petitioning creditors. This is on the theory that it is the duty of the parties invoking the jurisdiction wrongfully *to make restitution* (3 Am. Jur. pp. 739, 740). The fact that the petitioning creditors originally entered into the proceedings as intervenors is of no importance, because they, as intervenors, filed a new petition in 1941 and had their plan approved by the court. Their proceeding was a new proceeding and they stand in the position of petitioning creditors. Besides, *intervenors who assume active participation in the trial of a cause are chargeable with the costs* (2 C. J. S., Sec. 118). The Trustee was appointed at the instance of the intervening petitioners, who filed the involuntary petition in 1936. Counsel for the Trustee was appointed in the proceedings wrongfully invoked by them. They are chargeable with all of the costs of such proceeding.

The statement of the court that if the indenture trustee be taxed with costs, it would be charged against the bondholders, is based upon an erroneous assumption that where an indenture trustee commences a wrongful action, that he may charge the estate with the expense of the wrongful prosecution of his suit. Only where the indenture trustee invokes the proceedings lawfully and the reversal is on the ground of error in judgment could an indenture trustee recover the expenses. Where, however, the proceedings are void, the Trustee personally must bear the expenses. At any rate, the issue whether the indenture trustee should also be taxed for the costs was not presented on review and this should not have influenced the court in rendering its decision.

While in *Chain O'Mines* v. *United Gilpin Corp.*, 131 F. (2) 824 the court held that on a mandate to dismiss, the

court cannot award damages to the successful party on appeal this is inapplicate to cases involving seizure of property.

The leading case involving *restitution* is that of *Northwestern Fuel Co.* v. *Brock*, 139 U. S. 216. There the plaintiff and the defendant were before the court but the reversal for lack of jurisdiction was because of the failure on the part of the plaintiff to allege diversity of citizenship. In the meantime, the plaintiff had collected part of the judgment rendered in his favor and against the defendant. The court sustained the lower court in entering judgment against the plaintiff in favor of the defendant for the amount which the plaintiff had recovered under his illegal judgment. The court said (page 219):

> "But here the jurisdiction exercised by the court below was only to correct by its own order that which, according to the judgment of its appellate court, it had no authority to do in the first instance; and the power is inherent in every court, whilst the *subject matter of the controversy is in its custody, and the parties are before it, to undo that which it had no authority to do originally,* and in which it, therefore, acted erroneously, and to restore as far as possible, the parties to their former position. Jurisdiction to correct what has been wrongfully done must remain with the court *so long as the parties and the case are properly before it.*"
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> * * *

The identical question was decided adversely to petitioning creditors and intervenors (*In Re Snowden*, 36 F. (2) 282, 283; *Benitez* v. *Bank of Nova Scotia*, 109 F. (2) 743, 750, C. C. A. 1).

The District Court properly charged the cost and expense to the persons who wrongfully invoked the jurisdiction and the reversal of the order is in conflict with the decision of this Court.

this Court, and with the decision of the First Circuit.

II.

The order on Peer to turn over $7,033.40 to the non-existent trustee was clearly void and its affirmance was based on misconceptions of facts and law.

The affirmance of the order on Peer to turn over $7,033.40 to the Trustee, after the reversal of the order appointing the Trustee and the filing of the mandate, cannot be sustained on any theory and the court misconstrued the facts and overlooked the settled law as to the invalidity of the order.

(a) Misconception of Material Facts.

In giving the "historical statement" of the proceedings, the court assumed that the $7,033.40 was collected *before* the filing of the mandate. The contrary appears from its statement in the next paragraph that the mandate was filed June 28, 1943 and that on August 25, 1943, the court ordered the return of the $7,033.40 collected from July 1 to August 21, 1943. It is obvious that this was rent collected *after* the filing of the mandate and *not before* the filing. In fact, the petition of the Trustee (R. 5) asked for the rent collected for the month of July, 1943, which was *subsequent* to the filing of the mandate.

This fact is of extreme importance because the mandate of the court which was filed June 28, 1943, prior to the filing of the Trustee's petition, *reversed* the "order or decree" appointing the Trustee, which was "appealed from," and directed the trial court to dismiss the petition for lack of jurisdiction. The only function of the court was to enter the order dismissing the petition. The reversal of the order of June 17, 1942 *ipso facto* reversed the appointment of F. E. Hummel as Trustee. Upon the filing of the mandate, *he ceased to exist.* The subsequent

filing of the petition by him as *Trustee* and the order of the District Court on Peer to turn over the rents to Hummel *as Trustee,* when the office of the Trustee was no longer *in esse* was a nullity.

Whether or not the $7,033.40 collected for July and August, 1943, *subsequent* to the filing of the mandate, belonged to Peer, is a question to be decided in a court of competent jurisdiction between the parties claiming the fund. The District Court was without jurisdiction to determine the disposition of such fund, which Peer collected at a time when no trustee was in existence.

(b) Peer Was Not the Agent of the Trustee.

The statement of the court that Peer was the agent of the Trustee is faulty because subsequent to June 28, 1943, there was no longer a trustee *in esse* and Peer could not have been the agent of a non-existent trustee. Peer was in possession of the premises *prior* to the appointment of the Trustee as "Owner," as it appears from the report of Hummel (R. 67-68) that he collected "from Mr. Peer monies that he had collected as rental" *prior* to his appointment as Trustee, in the sum of $3,766.62. Peer was *not the agent of the Trustee for rents collected prior to his appointment* nor was he his agent after he *ceased* to exist.

The question whether Peer collected the rents as agent for the Trustee or as agent for someone else, or for himself was a question to be determined by a court having jurisdiction of the subject matter. The District Court was without jurisdiction to determine the disposition of the funds collected subsequent to the filing of the mandate.

(c) Misconception of Law.

Conceding *arguendo* that the Court of Appeals did not intend by its mandate reversing the appointment of the Trustee and directing the dismissal of the proceeding for want of jurisdiction to prevent the District Court from disposing of the "monies collected and held by the Trustee" as it says in its opinion, it certainly did not intend to authorize the Trustee, whose appointment was reversed, *to continue to collect the rent subsequent to the reversal* or to authorize the District Court to direct its non-existent Trustee to collect the rent thereafter.

It appears from Peer's answer that he was collecting the rents for July and August *not as the agent for the non-existent Trustee,* but for the owner of the equity (R. 7). The statement of the court that "Peer was merely an agent of the court's Trustee" is based on its misconception of the fact that in July, 1943, *Peer was no longer the agent of the Trustee* whose office expired *automatically* upon the filing of the mandate which *reversed* his appointment.

(d) The reversal of the order appointing the Trustee placed the parties in the position as if no trustee was ever appointed and the trial court was without jurisdiction to direct the non-existent trustee to collect the rents thereafter.

We have shown above that upon the filing of the mandate on June 28, 1943, the appointment of the Trustee was vacated. The ground being lack of jurisdiction the order was void *ab initio.* In defiance of the mandate the trial court ordered on July 22, 1943 (R. 9) that the Trustees which the Court of Appeals ousted June 28, 1943, should continue "to collect all August rent" and it directed the "tenants" to pay him the rent. Thereafter, on August 25, 1943, the

trial court ordered Peer to turn over to Hummel as Trustee the $7,033.40 collected "from July 1, 1943 to August 21, 1943." *There is no precedent for such orders.*

The reversal of the order appointing the Trustee for lack of jurisdiction placed the parties in the same position *as if the appointment was never made* (*Kaplan* v. *Joseph,* 125 F. (2) 602). The reversal operated as if no trustee was ever appointed (3 Am. Jur., p. 647). Upon the filing of the mandate on June 28, 1943, *the life of the Trustee was at an end.* It was "stone dead" in the language used by Judge Evans in the former opinion. The trial court had no right to prolong the life of the Trustee to August, 1943, as it had no right to *resurrect* him after his "death." It follows that the orders were *void* and the court clearly erred in affirming the void orders.

Regardless of the silence of the mandate as to the disposition of the funds in the hands of the trustee, the mandate ordering the proceedings dismissed for lack of jurisdiction could mean but one thing: that the trusteeship, which was reversed, come to an end and that the court take appropriate steps to terminate the trusteeship, and divest the trustee of money he then had on hand; not to attempt to collect new monies.

The opinion in sustaining the right of the District Court, in the case at bar, to continue the trusteeship beyond the period of the date of the mandate and to order the trustee to collect rents subsequently accruing, constitutes a modification of its mandate on the former appeal which it was not permitted to do. A mandate of a reviewing court becomes the law of the case upon a subsequent appeal. (*Casey* v. *Sterling Ceder Co.,* 15 Fed. (2d) 52.)

The Court of Appeals decided upon the previous appeal that the District Court lacked such jurisdiction over the subject matter and over the parties and it was improper

to appoint a trustee and reversed that appointment. The second appeal brought before the Court the same question, the right of the District Court to continue the trusteeship and to order the trustee to collect the rents coming due after the filing of the mandate. The direction to the trustee to continue collecting the rent was *inconsistent* with the mandate which reversed the appointment and which directed the dismissal of the proceedings. Bringing in new funds into the trustee's hands was not consistent with the dismissal of the case and the reversal of the appointment. The law announced in this decision, if permitted to stand, would destroy the general principals of our jurisprudence and encourage litigation in the hope that upon a subsequent appeal a different result might be obtained. (*U. S.* v. *Cannon*, 184 U. S. 572, 574.)

Conclusion.

We have shown that the decision reversing the order taxing the costs against the petitioning creditors who wrongfully invoked the jurisdiction of the Court conflicts with the decision of other circuits. We have also shown that the affirmance of the order authorizing the trustee to continue to manage the property after the reversal of the order of the appointment was in violation of the mandate, that the order charging the fees and the expenses of the trustee and its counsel against the fund cannot be sustained on any theory and that the judgment against the petitioning creditor was proper and that the Court of Appeals clearly erred. It follows that the Writ should be granted.

Respectfully submitted,

MEYER ABRAMS,
HAROLD J. GREEN,
MAURICE KAMM,
Attorneys for Petitioners.

Chicago, August 24, 1944.